BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of Eschelon Telecom, Inc. Against Qwest Corporation Alleging Qwest's Refusal to Honor Contractual and Legal Obligations and Request for Expedited Proceeding	ISSUE DATE: March 18, 2004 DOCKET NO. P-421/C-03-683 ORDER RESOLVING COMPLAINT

PROCEDURAL HISTORY

On May 5, 2003,[1] Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a complaint alleging that Qwest Corporation (Qwest) was violating the terms of their interconnection agreement (ICA) by overcharging for collocation and by withholding billing credits due for violations of the agreement's service quality standards. Eschelon asked for an expedited proceeding under Minnesota Statutes § 237.462.

On May 21, 2003, Qwest filed its reply.

On June 2, 2003, the Commission asserted jurisdiction over the matter and referred it to the Office of Administrative Hearings for a contested case proceeding before Administrative Law Judge (ALJ) Beverley Jones Heydinger.[2]

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[1] Although the Commission received Eschelon's complaint on May 2, Qwest's May 21 reply states that Qwest did not receive the complaint until May 5, 2003. Minn. Stat. § 237.462, subd. 6(d) directs a complainant to provide a copy of its complaint to the other party at the same time that the complainant files the complaint with the Commission. To better conform to this statutory requirement, Eschelon asks the Commission to regard the compliant as filed on May 5, 2003. See Eschelon filing (May 27, 2003).

[2] ORDER ASSERTING JURISDICTION, FINDING REASONABLE GROUNDS TO INVESTIGATE, AND DECIDING TO REFER THE MATTER TO OFFICE OF ADMINISTRATIVE HEARINGS (June 2, 2003); NOTICE AND ORDER FOR HEARING (June 2, 2003).

On September 4, 2003, Eschelon asked for summary judgment, alleging that the key facts in the case were not in dispute. At the prehearing conference, the parties agreed to limit discovery and submit the questions to the ALJ based on briefs.

On November 19, 2003, the ALJ issued her Final Recommendation on Motions for Summary Disposition (ALJ's Report). Eschelon and Qwest each took exception to the ALJ's recommendations by November 26, and replied to the other's exceptions by December 5. Qwest filed an additional exhibit on December 8.

The matter came before the Commission on February 19, 2004, and was addressed by Eschelon, Qwest and the Minnesota Department of Commerce (the Department). According to Minnesota Statutes § 14.61, subdivision 2, the case record closed on this date.

FINDINGS AND CONCLUSIONS

I. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996[3] (the 1996 Act) was designed to open all telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The Act opens markets by requiring each incumbent telephone company to –

- permit competitors to purchase its services at wholesale prices and resell them to customers;
- permit competitors to interconnect with its network on competitive terms; and
- offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to competitors without requiring the competitor to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.[4]

A competitor desiring to provide local exchange service can seek agreements with the incumbent related to interconnecting with the incumbent's network, the purchase of finished services for resale, and the purchase of the incumbent's UNEs. 47 U.S.C. §§ 251(c), 252(a). If the parties cannot reach agreement, either party may ask the State commission to arbitrate unresolved issues and to order terms consistent with the 1996 Act. 47 U.S.C. § 252(b). Parties may ask the commission to arbitrate the appropriate cost of UNEs, interconnection, and methods of obtaining access to UNEs. 47 C.F.R. §§ 51.501, 51.505.

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[3] Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[4] 47 U.S.C. § 251(c).

In particular, the 1996 Act provides for competitors to rent space within the incumbent's wire centers and to collocate their equipment there. For security, some competitors ask that the incumbent put up a fence, or "cage," around their equipment. But other competitors forgo such fences and simply rent "cageless" space within the wire center, typically within the incumbent's equipment rack. Competitors that collocate equipment in an incumbent's wire center must also secure a source of electricity from the incumbent to power the equipment.

Competitors have the option of negotiating the terms of their ICA with the incumbent or adopting the terms of an ICA negotiated by others, or both. All interconnection agreements are to be submitted to the Commission for review and approval. 47 U.S.C. § 252(e).

II. COLLOCATION COMPLAINT

Eschelon makes two general complaints against Qwest. First, Eschelon alleges that Qwest overcharged Eschelon for cageless space preparation and 40-ampere DC power facilities when Eschelon collocated its equipment in Qwest's central offices in 1999 and 2000. A lengthy chronology is necessary for understanding the parties' arguments.

A. Background

1. First Generic Cost Docket

On May 3, 1999, the Commission issued its Order in its *First Generic Cost Docket* arbitrating prices for a broad range of Qwest's elements.[5] (The docket was designated a "generic" docket because the resulting prices were expected to be incorporated into the ICAs of many parties.) No party had asked the Commission to determine the cost of providing 40 amp power delivery or cageless space preparation; consequently, these elements were not included in that Order.

2. Interconnection Agreement

On October 4, 1999, the Commission approved an ICA between Cady Telemanagement, Inc., (Cady) and US WEST Communications, Inc. (US WEST)[6] based on the ICA that US WEST had signed with AT&T Communications of the Midwest, Inc. (AT&T Contract). Cady subsequently changed its name to Eschelon and US WEST was acquired by Qwest, but the contractual relationship between the parties remained.

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[5] *In the Matter of a Generic Investigation of US West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements*, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540 (*First Generic Cost Docket*) ORDER RESOLVING COST METHODOLOGY, REQUIRING COMPLIANCE FILING, AND INITIATING DEAVERAGING PROCEEDING (May 3, 1999).

[6] Docket No. P-5340, 421/M-99-1223.

The agreement states that all current services and new and additional services will be priced in accordance with the 1996 Act and its rules, and orders of this Commission and the Federal Communications Commission. ¶ 41.1. It states that collocation costs should be billed initially based on interim prices, with the understanding that the parties would bill or credit each other retroactively ("true-up") based on the difference between the interim rates and permanent rates established in subsequent Commission proceedings. ¶ 41.11; Schedule 3 "Physical and Virtual Collocation Prices."

3. Second Amendment

On January 24, 2000, the parties signed a Second Amendment to their ICA setting forth collocation rates, including nonrecurring rates for two items – "48 volt DC power cable, per foot, per A & B feeder 40 ampere capacity" and "cageless physical collocation," – that are the subject of the current complaint.

The Second Amendment replaces the ICA's provisions regarding pricing and collocation with new terms. Second Amendment ¶¶ 1.1.3, 5, and 6.2.5. The Second Amendment states:

> All costs will be those costs and cost elements approved by the MPUC [the Commission], in either the AT&T Contract or, to the extent applicable, interconnection arbitration or generic cost dockets. To the extent that a rate element or rate is modified or not allowed under current MPUC rulings or in any MPUC Cost Order, the MPUC's determination will govern.... Any cost for which there is no currently applicable MPUC approved rate shall be developed by [Qwest] and subject to acceptance by [Eschelon].[7]

The amendment also contains a dispute resolution clause. At ¶ 21.1 it says that –

> ...final decisions of the MPUC in cost docket or other proceedings will govern the final determination of all cost issues, including the "true-up" of costs already billed and collected.

4. Eschelon's Collocation Request

In 1999 and 2000, Eschelon collocated equipment in Qwest's wire centers, paying Qwest to prepare the space and provide a means of obtaining 40 amp power. These costs are the subject of the current complaint.

5. Unfiled Agreement

Between February 28, 2000, and March 1, 2002, Eschelon and Qwest entered into six interconnection agreements that they refrained from filing with this Commission in violation of the

[7] Second Amendment ¶ 6.1.

1996 Act and state law.[8] As part of one such agreement, designated the "Confidential Second Amendment to Confidential Trade Secret Stipulation," on March 19, 2001, Qwest agreed to pay Eschelon to release –

> any claims that it can or could have brought against Qwest [prior to March 1, 2001] relating to ... true-ups pursuant to decisions of the [Commission] in [the *First Generic Cost Docket*], including for collocation....

In this document, Eschelon also broadly releases Qwest from claims "in any way relating to or arising out of the billing disputes/matters addressed herein."

6. Second Generic Cost Docket's Interim Order

The Commission initiated a *Second Generic Cost Docket* to arbitrate prices intended to be incorporated into various ICAs. On April 4, 2002, the Commission issued an Order declaring that all Qwest rates under evaluation in that docket were interim and subject to true-up back to the date of the Order.[9]

7. Onvoy Docket

On July 3, 2002, the Commission established the price for cageless collocation and 40 amp power delivery in the context of a complaint brought by Onvoy, Inc. against Qwest (*Onvoy Docket*).[10] The Commission directed Qwest to true-up the amounts paid by Onvoy for cageless collocation and 40 amp power. But unlike the *Second Generic Cost Docket*'s interim order, the Commission did not restrict the true-up to expenses incurred since April 4, 2002.

8. Second Generic Cost Docket's Final Order

On October 2, 2002, the Commission established prices for elements in the *Second Generic Cost Docket*, including nonrecurring costs for 40 amp power delivery and cageless space preparation. This Order triggered the obligation to true-up accounts for costs incurred since April 4, 2002, the date of the interim order.[11]

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[8] See *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197.

[9] *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element Prices*, Docket No. P-421/CI-01-1375 (*Second Generic Cost Docket*) ORDER ESTABLISHING INTERIM RATES.

[10] *In the Matter of Onvoy, Inc.'s Complaint Against Qwest and Request for Expedited Hearing*, Docket No. P-421/C-01-1896 ORDER RESOLVING COMPLAINT, SETTING COLLOCATION PRICES, AND SETTING PROCEDURAL SCHEDULE.

[11] *Second Generic Cost Docket*, ORDER SETTING PRICES AND ESTABLISHING PROCEDURAL SCHEDULE.

B. ALJ's Recommendation

The ALJ concludes that the Second Amendment governs the parties' true-up obligations for the items in dispute. This amendment is the source of all the collocation terms currently in effect, and it lists terms for 40 amp power delivery and cageless space preparation.

The ALJ was not persuaded that the waiver contained in the unfiled agreements governs this case. The waiver addressed claims related to prices set in the *Generic Cost Docket*, but 40 amp power delivery and cageless space preparation were not addressed in that docket.

The ALJ noted that the Commission set rates for 40 amp power delivery and cageless space preparation in both the *Onvoy Docket* and the *Second Generic Cost Docket*, and recommends that Eschelon receive the benefits of both dockets. Noting that in the *Onvoy Docket* the Commission authorized a true-up back to 1999, the ALJ recommended a similar policy for the current case.

C. Qwest's Exception

Qwest opposes the ALJ's recommendation. Qwest acknowledges that the Commission determined prices for 40 amp power delivery and cageless space preparation in the *Second Generic Cost Docket* and that Eschelon is entitled to the benefit of those prices. But Qwest noted that the Commission did not require true-ups in that docket prior to April 4, 2002.

The ALJ's reliance on the *Onvoy Docket* is misplaced, according to Qwest. The *Onvoy Docket* involved setting a price for an elements that had not been included in any ICA before – that is, elements that were not subject to the limitations of any ICA. In contrast, the current case pertains to truing-up prices for elements that have been addressed in the parties ICA, which imposes limitations on true-ups.

And unlike Onvoy, Eschelon entered into agreements releasing all claims arising before March 1, 2002, for collocation true-ups "in any way relating to or arising out of" the *Generic Cost Docket* as part of an unfiled agreement. While the *Generic Cost Docket* did not actually establish a price for 40 amp power delivery or cageless space preparation, it did establish the cost model that would determine these prices. Consequently, Eschelon's true-up demand is related to the *Generic Cost Docket*, and therefore is governed by the settlement.

D. Eschelon's Reply

Eschelon dismisses Qwest's exceptions as a mere restatement of its arguments before the ALJ without finding legal or substantive fault with the ALJ's Report.

E. Department's Comments

The Department agrees with the ALJ that the Second Amendment controls this issue, although the Department disagrees about how the amendment applies. The Second Amendment states that the prices the parties had negotiated would remain in effect unless the Commission adopted a different

price in the context of the AT&T Contract, an interconnection arbitration, or a generic cost docket; in that event, the terms of the Commission's new order would govern. Applying this understanding of the Second Amendment, the Department argues that the parties should have continued using the Second Amendment's price for 40 amp power supply and cageless space preparation until the *Second Generic Cost Docket* was resolved, and then should have trued-up those prices back to April 4, 2002, as provided in that docket.

F. Commission Action

The Commission agrees with the Department that Qwest need not true-up its payments prior to April 4, 2002.

As the ALJ and the Department concluded, the ICA's Second Amendment governs the extent of the parties' true-up obligations. The Second Amendment represents the first time that the parties set prices for 40 amp power delivery or cageless space preparation, and it establishes the terms under which those prices would be trued-up. As noted above, ¶ 6.1 states:

> All costs will be those costs and cost elements approved by the MPUC, in either the AT&T Contract or, to the extent applicable, interconnection arbitration or generic cost dockets.

Consequently, the parties' duty to true-up their bills for 40 amp power delivery or cageless space preparation is governed by the terms of a Commission order that fulfills two criteria: First, the order must derive from the set of orders specified by the parties – the AT&T Contract, an interconnection arbitration or a generic cost docket. Second, the order must address the cost for 40 amp power delivery and cageless space preparation.

The AT&T Contract did not establish prices for 40 amp power delivery or cageless space preparation. Nor did any other arbitration docket. Nor did the first *Generic Cost Docket*. The first time the Commission established prices for these items was in the *Onvoy Docket*. But that was a complaint case brought by a third party; the parties never agreed to let third-party complaint cases govern their costs. None of these cases resolves the question.

Only the *Second Generic Cost Docket* qualifies to govern the parties' true-up obligations. Clearly it is a generic cost docket, and it establishes nonrecurring prices for 40 amp power and cageless space preparation. Consequently the *Second Generic Cost Docket* establishes the prices to which the parties must true-up their accounts.

The Second Amendment not only established the types of dockets that might trigger a true-up but also specified that those dockets would govern the scope of true-ups.

> The Parties further agree that all cost disputes may be resolved through the Dispute Resolution section of the [ICA] and that *final decisions of the MPUC* in cost docket or other proceedings *will govern the final determination of all cost issues, including the "true-up" of costs already billed and collected.*[12]

As noted above, the Commission's Interim Order in the *Second Generic Cost Docket* limited the rights of parties to seek to true-up costs to costs incurred after April 4, 2002. That is, the Commission determined the appropriate price for 40 amp power and cageless space preparation, but only regarding costs incurred since April 4, 2002; the *Second Generic Cost Docket* imposes no obligation to true-up costs to any earlier period. Consequently, the parties' duty to true-up their accounts for 40 amp power delivery and cageless space preparation does not extend back beyond April 4, 2002.

Qwest argues that in an unfiled agreement, Eschelon waived Qwest's duty to true-up payments for costs incurred prior to March 1, 2001. Having determined the extent of the parties' true-up obligations on other grounds, the Commission need not address the unfiled agreements issue here.

For the foregoing reasons the Commission concludes that the parties' obligations to true-up their accounts for 40 amp power delivery and cageless space preparation extends back to April 4, 2002. Eschelon is not entitled to a true up of expenses for 40 amp power delivery and cageless space preparation incurred prior to that date.

III. BILLING COMPLAINT

Eschelon also complains that Qwest systematically fails to provide bills that conform to the ICA's service quality provisions ("Direct Measures of Quality" or "DMOQs"), resulting in 100% non-compliance. Eschelon argues that it is entitled to the bill credits provided for in the DMOQs as compensation. Again, a chronology is useful for understanding the parties' arguments.

A. Background

1. Interconnection Agreement

In their 1999 ICA, Qwest agreed to render accurate bills to Eschelon as follows:

> Section 12. Billing Attachment 7 – Bill Accuracy Certification
>
> The Parties agree that in order to ensure the proper performance and integrity of the entire Connectivity Billing process, [Qwest] will be responsible for and accountable for transmitting to [Eschelon] an accurate and current bill. [Qwest] agrees to implement control mechanisms and procedures to render a bill that accurately reflects the Elements, Combination and Local Services ordered and used by [Eschelon].

[12] ¶ 21.1 (emphasis added).

The initial version of the parties' DMOQ provisions appeared as part of their 1999 ICA at Attachment A, Appendix B. It directs Qwest to offer bill credits to Eschelon for failing to meet specified service quality standards. In particular, one DMOQ was labeled B-4, "Accuracy of Mechanized Bill Format – Wholesale" and established billing standards.

2. 2000 Stipulation

On March 1, 2000, the parties signed a Stipulation and Agreement that, among other things, amended their ICA's DMOQ provisions. B-4 became "Billing Accuracy – Adjustment for Errors," and another measure was labeled "Total Revenue Billed Without Error/Total Billed Revenue Billed in the Reporting Period." The Stipulation provided that –

> With respect to measurement of B-4, parties agree to collaboratively determine the dollar value of billing that is disputed prior to [Eschelon's] claim for credits being made.

3. Eighth Amendment

On December 4, 2000, the parties signed the Eighth Amendment to their ICA. As part of the amendment, Qwest agreed to provide to Eschelon a combination of elements which they called UNE-Eschelon (UNE-E or UNE-Star), which are the subject of this complaint.

UNE-E functions as a substitute for certain services that Eschelon had been purchasing from Qwest at wholesale rates for resale to Eschelon's customers. Various competitors purchase from Qwest a similar combination of elements known as the UNE Platform (or UNE-P). But at least for some period, Eschelon found Qwest's UNE-P offering inadequate; Qwest offered the UNE-E combination as a substitute.

While the record reveals no problems with Qwest's ability to render bills for its UNE-P, Qwest has been unable to get its mechanized billing system to produce accurate bills for UNE-E. Instead, the parties have implemented a "three-step process." First, Qwest issues statements reflecting Eschelon's orders and including the cost of those orders calculated on the basis of a wholesale discount. Second, Qwest manually calculates Eschelon's bill based on the UNE-E price. Third, Qwest shares this calculation with Eschelon. Eschelon then reviews the bill, paying it or challenging it as Eschelon deems appropriate. Qwest treats the UNE-E bill as due only after Eschelon's review. Qwest and Eschelon anticipated that this billing arrangement would be temporary, and that Qwest would eventually implement an accurate mechanized process.

4. Unfiled Agreements

As noted above, between February 28, 2000, and March 1, 2002, Eschelon and Qwest entered into six interconnection agreements, but refrained from filing them with the Commission in violation

of the 1996 Act and state law.[13] This series of agreements purports to settle the parties' billing disputes through February, 2002. According to the unfiled agreement signed on March 1, 2002, the parties agreed to the following:

> 3. Actions to be Taken. The Parties shall undertake the following actions:
>
> * * *
>
> (e) Qwest shall make the UNE-E offering and existing business processes related to the UNE-E offering available to Eschelon through the current term of the Interconnection Agreement Amendment Terms dated November 15, 2000.
>
> (f) Within ten days of the Effective Date, the Parties shall form a joint team. The purpose of the joint team shall be to develop a mutually acceptable plan (the "Plan") to convert UNE-E lines to UNE-P. Qwest and Eschelon shall use best efforts to cooperate in converting UNE-E lines to UNE-P in accordance with the plan.
>
> (g) Qwest and Eschelon shall work closely together in moving Eschelon from a manual to a mechanized process so that Eschelon can bill for access on UNE-P.... If the Parties are unable to agree on the date of the termination of the manual process, then the parties shall follow the procedures described in paragraph 8 below [preserving each party's legal rights.]

5. Section 271

Section 271 of the 1996 Act provides for Qwest to enter the long-distance market under certain conditions. In investigating whether Qwest had fulfilled those conditions, an ALJ remarked that Qwest's UNE-E offering was substandard, especially with regard to billing accuracy.[14] The Commission neither adopted nor rejected this conclusion.

2. ALJ's Recommendation

The ALJ summarizes this issue as follows: Eschelon alleges that Qwest has failed to render adequate bills to Eschelon as prescribed by their ICA, thereby triggering Qwest's obligation to compensate Eschelon as provided in the ICA's DMOQ provisions. Eschelon argues that Qwest's

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[13] See Docket No. P-421/C-02-197, *supra* n.8.

[14] *In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 1, 2, 4 , 5, 6, 11, 13 and 14*, Docket No. P-421/CI-01-1371, Findings of Fact, Conclusions of Law and Recommendations (January 24, 2003).

mechanized system sends out statements to Eschelon noting the orders placed and the cost of such orders calculated on the basis of a wholesale service discount rather than on the terms of their ICA. On these grounds, Eschelon alleges that Qwest's UNE-E bills are 100% inaccurate, in violation of the ICA.

The ALJ acknowledges that Qwest has been unable to cause its computerized billing system to issue accurate bills for UNE-E. Instead, Qwest has billed for this product using a three-step process discussed above. While the three-step process may be cumbersome, the ALJ found no evidence that it produced consistently inaccurate results. Admittedly, the first step of the process would not, by itself, fulfill the requirement to produce accurate bills. But the ALJ concluded that the results of the three-step process, rather than the initial statement, represents the "bill" that must conform to the DMOQ's standards. In the absence of a showing that the three-step process produced systematically inaccurate results, the ALJ recommended denying Eschelon's claims.

3. Eschelon's Exception

Eschelon asks that the Commission decline the ALJ's recommendation on this issue and instead refer the matter for a contested case proceeding. While Eschelon had initially sought to have the matter resolved on the basis of a summary judgment, the number of factual disputes that Eschelon has with the ALJ's recommendations leads Eschelon to seek further development of the record.

Eschelon raises the following concerns:

- The ALJ said that the parties had entered into settlements covering the period from February 2000, through March, 2001. Eschelon asserts that the settlements resolved the billing dispute issue from the inception of their ICA until March 1, 2002.

- While the ALJ correctly notes that the parties agreed to work out Eschelon's billing disputes prior to Eschelon making a claim for billing credits, the ALJ inaccurately attributed this language to the March 2002 agreement rather than the February 2000 stipulation.

- The ALJ cites language in the March 2002 agreement stating that the parties will work cooperatively to convert the UNE-E lines to UNE-P. Eschelon argues that this language is irrelevant to the current case. Moreover, the discussion of this language suggests that the ALJ confused this provision with the provision regarding Eschelon's plan to stop serving some customers through reselling wholesale services and instead serving them through UNE-E.

- The ALJ cites other language in the March 2002 agreement stating that the parties will work cooperatively to convert Eschelon from a manual to a mechanized process so that Eschelon can bill for access on UNE-P. Eschelon argues that this language is irrelevant to the current case, and again suggests that this discussion demonstrates the ALJ's confusion in these matters.

- Eschelon disputes the ALJ's conclusion that Eschelon acquiesced in the current billing arrangement when it adopted the March 2002 settlement saying that "Qwest shall make the UNE-E offering and existing business processes related to the UNE-E offering available to Eschelon through the current term of the [ICA] Amendment Terms dated November 15, 2000." Eschelon argues that the March 2002 settlement preserved any DMOQ claims that might arise after February 28, 2002.

- Eschelon disputes the ALJ's conclusion that the three-step billing process constitutes the relevant process for evaluating compliance with the DMOQ standards.

B. Qwest's Reply

Qwest disputes Eschelon's characterization of the ALJ's Report. Moreover, Qwest denies that Eschelon's allegations undermine the ALJ's recommendation, much less that they justify referring the matter for a contested case.

Qwest acknowledges that its mechanized system does not render accurate bills, and that all three steps are required before accurate bills are achieved. At times Eschelon has rendered payment based on Qwest's bill estimate, requiring Qwest to reimburse Eschelon for the difference. But Qwest alleges that for the period involved in this proceeding, Qwest has adjusted the Eschelon UNE-E bill before the bill became payable. Consequently the relevant bill for DMOQ purposes is the bill rendered at the end of the three-step process. And, contrary to Eschelon's allegations, these bills are not 100% inaccurate. Therefore the ALJ is justified in recommending that this complaint be denied.

C. Department's Comments

The Department supports the ALJ's recommendation and opposes the proposal to return this matter for a contested case proceeding.

According to the Department, DMOQs were designed to ensure that Qwest gives competitors accurate bills. The record reveals little evidence that Eschelon's ultimate bills are inaccurate or that Eschelon is being overcharged. At one point DMOQs required mechanized billing. While the Department favors mechanized billing as a desirable practice, the fact that the parties agreed to remove it from the terms of their DMOQs would preclude citing the lack of such billing as the basis for demanding DMOQ credits.

Finally, the Department notes that Eschelon agreed to have Qwest continue making the UNE-E offering – including "existing business practices related to UNE-E" – available prospectively. Given this agreement, the Department cannot conclude that Qwest's current business practices regarding UNE-E are inconsistent with the terms the parties bargained for.

D. Commission Action

The DMOQs provide for a measure of compensation when Qwest fails to comply with certain ICA requirements. The ICA between Qwest and Eschelon provides for Qwest to render accurate bills. Having reviewed the record of the case and the arguments of all parties, the Commission finds insufficient evidence that Qwest has failed to provide accurate bills as required. The Commission concludes that the "bills" in question are the bills that result at the end of the three-step process rather than the statement mechanically issued by Qwest at the start of the process.

The history of the parties' relationship – including the elimination of the DMOQ requirement for "mechanized bills," and the agreement to "collaboratively determine the dollar value of billing that is disputed prior to [Eschelon's] claim for credits being made" – suggest that a collaborative billing arrangement meets the expectations of both parties, provided it produces accurate results. Eschelon's exceptions to the ALJ's Report, even if true, do not reverse the ALJ's conclusion that Eschelon has failed to demonstrate that Qwest's bills are systematically inaccurate.

Eschelon correctly observes that the ALJ in the § 271 investigation found deficiencies in Qwest's billing for UNE-E. This finding, however, has little bearing on the current complaint. The 1996 Act calls for incumbents to cooperate with competitors in offering elements and services on a wholesale basis. New competitors are especially vulnerable to stonewalling by incumbents. The § 271 investigation was designed to explore this issue. While the record of the current complaint shows that Qwest's mechanized billing system leaves something to be desired, it does not demonstrate stonewalling. To the contrary, it demonstrates a long (and sometimes covert) history of trying to work things out, involving compensatory efforts by Qwest and acquiescence by Eschelon. Whatever the legal effects of the unfiled agreements, they provide evidence of the parties expectations of each other; Eschelon has failed to demonstrate that Qwest has not fulfilled those expectations.

Consequently, the Commission will adopt the recommendation of the ALJ and deny Eschelon's request with respect to this issue. The Commission will so order.

ORDER

1. Qwest's obligation to pay Eschelon for the difference between the interim and the final price for 40 amp power delivery and cageless space preparation is set forth in the Commission's ORDER SETTING PRICES AND ESTABLISHING PROCEDURAL SCHEDULE (October 2, 2002) in Docket No. P-421/CI-01-1375 *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element Prices.* The parties need not true up accounts for 40 amp power delivery and cageless space preparation purchased from Qwest prior to April 4, 2002.

2. The ALJ's second recommendation – denying Eschelon's motion to compel Qwest to issue billing credits to Eschelon for the period of March 2002 to the present pursuant to their ICA's Direct Measures of Quality provisions – is adopted.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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